

Law and Sentiment

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Maximilian Steinbeis Sa 25 Aug 2018

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Dear Friends of Verfassungsblog,

One of the hottest topics of this exceedingly hot summer in Germany, while I was taking a break from my weekly editorial, was the ominous affair of Sami A., a hard-core Salafi preacher from Bochum who allegedly had once been Osama Bin Laden's bodyguard and, after a heavy campaign by the tabloid newspaper BILD, was finally deported to his native Tunisia on August 15. What made this a matter of particular constitutional concern was the fact that the authorities had deported the man in spite or even in open defiance of a court injunction which had explicitly forbidden it. The outrage of the legal community was not exactly assuaged when the responsible Home Secretary of the state of North Rhine-Westphalia, a former CDU MEP named Herbert Reul, called on the courts not to detach themselves too far from the "legal feelings" (*Rechtsempfinden*) of the population. The implication was clear: That the law should protect a buddy of Bin Laden from being sent back to his home country is just unacceptable to most people, torture hazard or not, and that has somehow to be taken into account when finding the law. And if the courts fail to do that, it's them who are to blame if officials elected by the people choose to go along with the *Rechtsempfinden* instead of obeying the orders of the courts.

That caused a considerable public outcry, for obvious reasons: Both the executive and the judicial branches of government, under Article 20 (3) of the *Grundgesetz*, are bound by the law and the law alone, as opposed to popular opinion which is notoriously prone to flirt with the most appalling things like torture and police brutality and capital punishment and mustn't be trusted in general, particularly not in these times of right-wing populism on the rise. Some were reminded by Reul's choice of words of the Nazi term "*gesundes Volksempfinden*" (sound opinion/feeling of the people), which had been introduced into German penal law in the 30s as a basis to prosecute people for deeds that wouldn't have been punishable under statutory law alone – one of the prime examples of how Nazi legislation perverted the rule of law.

None of that is wrong, but it misses the crucial point, in my view. What is scandalously wrong and dangerous about the minister's choice of words, even more than its reference to *VOLKSEmpfinden*, is its reference to *VolksEMPFINDEN*.

The word *Empfinden*, both as a noun and as a verb, has a distinctly romantic, sentimental ring to it which suggests that you experience the world in an immediate, uncommunicated and uncommunicable way, as an impression of your soul, a matter not of sensibility but of sensitivity: You just feel it.

That's all very well if you apply it to the Rhine or gothic cathedrals or the deep, dark German oak forest. But in conjunction with the law it is a recipe for disaster. With the law, there is nothing to *empfind* about.

In a democratic state, the law is what the democratically constituted people decides to be collectively binding, a text that, as all texts, requires interpretation to determine how individual cases should be decided. The deciding part is what judges do. The interpreting part, however, is in principle open to everyone. Judge, law professor, dentist, plumber – everyone has an equal right to hold and express his or her opinion about what the law is and what the law should be. We don't live in a time any more where the law is handed down by some higher wisdom for the people to dutifully obey, do we? Of course judges should care about what people say about what the law is. Why shouldn't they? Who are they to rule out that they might learn something useful?

Interpreting the law, however, is a risky thing. Your interpretation will be contested. You'll have to give reasons. You'll have to open yourself to criticism. You'll be attacked. You might find that you don't know the facts well enough to defend yourself. That there are things and aspects you haven't thought about. That you may have to eat your words. That you may look foolish.

Any dentist or a plumber prepared to take that risk is as perfectly entitled to be heard and taken seriously with her interpretation of the law as any law professor. Not so with sentiments, however. What a person *feels* about the law is of no concern or relevance to anybody but herself, and certainly not to the judiciary. The unpleasant sensations one person might experience facing Sami A.'s deportation are, as far as the law is concerned, just as pointless as the discomfort another person harbours in her soul about his possible return.

To revert to sentiments is the strategy of those who want to be right without having to argue. What a person feels can't be contested, can't even be discussed, one just has to believe it, and if another person doesn't and contests and criticizes those feelings, she gives offense against which you'll defend yourself not with arguments but with force. That is basically what the bulk of right-wing populist discourse boils down to. That is also why the Nazis liked *Volksempfinden* so much. That is what a state under the rule of law must distance itself from if it wants to survive.

Faits accomplis

Over the summer, when I paused with this editorial, Verfassungsblog remained active, and we rarely had reason to complain about a lack of issues. I'll limit myself to the last few weeks.

First of all, our constant worry **Poland**: The PiS government and the newly subjugated National Council of the Judiciary have set out to create a *fait accompli* in the struggle to bring the Supreme Court under PiS's thumb once and for all, in the face the ongoing "dialogue" with the EU Commission and the desperate protests of the Polish judges' association, the Ombudsman and civil society. The National Council of Justice has already nominated a number of new judges for the Supreme Court, who must now be appointed by President Andrzej Duda. Then, Duda can pick one of them as the new Chief Justice to replace the incumbent Małgorzata Gersdorf, who to date still opposes her forced early retirement on the basis of her six-year term of office enshrined in the Constitution. Once the new judges are in office, it will not be easy to get rid of them again, even if the European

Court of Justice in Luxembourg should later come to the conclusion that the interference with the independence of the judiciary was incompatible with EU law. Hungary has already successfully demonstrated how to pull this off.

At the beginning of August, the Polish Supreme Court, with the courage of desperation, itself submitted questions on judicial independence as a requirement of EU law to the European Court of Justice, analyzed by ROBERT GRZESZCZAK and IRENEUSZ KAROLEWSKI. The big question is whether the ECJ will accept this question as relevant to the decision of the specific case and will therefore consider the referral admissible, which is not necessarily self-evident. STANISŁAW BIERNAT, the former vice-president of the Polish constitutional court, who has experienced the hardships of PiS justice policy at first hand like hardly anyone else, describes together with MONIKA KAWCZYŃSKA what this problem is about and how it could be solved.

India is currently governed by people whose Hindu nationalism does not shy away from much, as the recent example in the north-eastern state of Assam shows. There the government in Delhi threatens to banish the Muslim minority into statelessness. CATHARINA CASPARI reports (German).

This summer, **Germany** was struck by one of the periodically recurring discussions about introducing a term of compulsory national service. TIM WIHL investigates how such a duty would have to be structured to pass the numerous constitutional and human hurdles it would have to face (German).

GRIETJE BAARS took a closer look at the **German** draft law to comply with the ruling of the Federal Constitutional Court and to create a third option in civil status law alongside Male and Female and does not find the result at all satisfactory.

Meanwhile, in **France**, the National Assembly has passed a bill to tighten the right of asylum. CATHERINE HAGUENAU-MOIZARD examines what it contains and what constitutional questions it raises.

The international legal problem of rescuing refugees on the Mediterranean has also been on hotly discussed this summer and will apparently not go away anytime soon. NELE MATZ-LÜCK disentangles the threads of international law and concludes, among other things, that the practice of Italian ships to return refugees to Libya is clearly contrary to international law (German).

ELAINE FAHEY reports on Facebook's procedural attempts before the Irish Supreme Court to torpedo the judicial review of the EU-US data protection agreement – an epic battle with potentially immense legal, potential and economic consequences.

Elsewhere

MANUEL MÜLLER examines the prospects of new transnational parties that want to run for next year's **European** Parliament elections (German).

PIERRE DE VOS tries to calm the overheated debate about an amendment of the constitution of **South Africa** to facilitate the expropriation of (white) landowners.

OONA HATHAWAY is dampening hopes that **US** President Trump will be impeached after two of his former companions have been convicted or plead guilty, even in the case of the Democrats gaining a majority in the House of Representatives this fall.

MASAHIRO KUROSAKI explains how the constitutional restrictions on national self-defense in **Japan** have changed since 2014 through reinterpretation of the Constitution.

LAUREN AARONS makes her readers aware of the plight of thousands of defenseless women in **Nigeria** and **Iraq** suspected of being connected to IS and Boko Haram, respectively.

BÁRBARA MENDONÇA BERTOTTI looks back on the constitutional capping of state expenses in **Brazil** since 2016 and discusses ways of getting rid of this socially brutal and potentially even unconstitutional piece of constitutional law.

ANTON LOVIN examines how the new transplantation law in **Ukraine** punches holes into the ban on organ trafficking and what international law problems that causes.

That's it for this week. On our own behalf, our editorial assistant CARLA DIETMAIR has decided to turn to new shores, namely those of the Republic of Colombia, where she intends to travel for a while before starting her *Referendariat* next year. I very much hope that she will also do some reporting from this exciting region for Verfassungsblog. We remaining editors thank Carla and wish her tons of fun and success! At the same time, we are very proud and happy that the fabulous SINTHIOU BUSZEWSKI has agreed to join our Associate Editors team as an expert for international law and human rights. A very warm welcome!

All the best, and take care,

Max Steinbeis

P.S. Oh, and one more thing: Are you already a supporter of Verfassungsblog? If not, and if you enjoy what we do and like our service, please consider joining the slowly, but steadily growing community of donors. They help keeping VB afloat and independent, for the puny, measly sum of just 4 piddly Euros per month each! All you have to do is click [here](#).

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SUGGESTED CITATION Steinbeis, Maximilian: *Law and Sentiment*, *VerfBlog*, 2018/8/25, <https://verfassungsblog.de/law-and-sentiment/>.